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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 510

W. T. GRANT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, W. T. Grant Company, prays that a writ of certiorari issue out of this court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered on November 10, 1952, affirming a decision of the National Labor Relations Board whereby it was found that your petitioner had violated section 8 (a) (1) and (5) of the National Labor Relations Act, as amended. (Title 29 United States Code section 158 (a) (1) and (5)).

Jurisdiction

The jurisdiction of this court is invoked under the United States Code: section 1254 (1) of Title 28, and section 160 (e) of Title 29.

Opinions Below

The opinion of the United States Court of Appeals (Healy and Pope, Circuit Judges, Harrison, District Judge) has not yet been reported. It is printed in the record pages 215 to 219. The decision and order of the National Labor Relations Board is printed in the record (R. 22 et seq.).

Questions Presented

1. Is a union's demand for bargaining, made before the union obtains authorization cards from a majority of the employees, in an agreed and appropriate bargaining unit, rendered valid *ab initio* by the union's subsequent attainment of cards from a majority?

If the foregoing question is answered in the affirmative, petitioner presents this further question:

2. Where twenty of thirty-nine employees in an agreed and appropriate unit had signed union authorization cards, but there was doubt as to whether one of the twenty had revoked her authorization, would the union's majority status be so clearly established that the employer would not be justified in withholding recognition of the union and maintaining that his employees were entitled to make a free choice in a secret, Board-conducted election?

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended, namely sections 8 (a) (1) and (5) and 9 (c) (1) (Title 29 U. S. C sections 158 (a) (1), 158 (a) (5) and 159 (c) (1)) are set forth in the Appendix *infra*, page 10.

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Statement

Petitioner operates a chain of retail stores in several of the United States but only its store in San Jose, California is involved in this proceeding.

On January 5, 1950, (R. 169) the union's business agent visited petitioner's store and informed the store manager that the Retail Clerks Union, whom he represented, had sent him a letter asking for recognition of the union as they felt that a majority of the people working in the store had designated the union as their bargaining representative (R. 125). The following day petitioner's store manager received the letter (R. 70). In it the union requested a bargaining conference. On the same day, January 6, 1950, the writer of the letter, the Secretary-Treasurer of the union, telephoned to the store manager asking what action the store manager was taking on his letter. The store manager answered that he was referring the letter to the company's labor counsel, adding that the union ought to petition the National Labor Relations Board for an election (R. 170). The union official said he would prefer to discuss the matter later with petitioner's labor counsel.* The petitioner's labor counsel met with the union representatives on January 25, 1950. He, too, suggested that the employees should decide, in a secret, Board-conducted election, whether they desired to be represented by a union. On January 31, 1950, a petition for an election was filed, but the union subsequently withdrew it and filed charges that the company had violated section 8 (a) (1) and (5) of the Act.

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* It developed that the union was unwilling to have an election. As the business agent explained it, "I believe we practically insisted that we don't have an election, since it takes so much time and so much nonsensical procedure" (R. 206).

For the sole purpose of narrowing the issue before this court petitioner will concede that it violated section 8 (a) (1).*

There were forty employees in the unit when, on January 5, 1950, the union requested a bargaining conference. At the hearing it was shown that, at that time, eighteen employees had, by means of authorization cards, designated the union as their bargaining representative. It also appeared that three employees signed cards on January 6, 1950, and that one "during the month of January" had revoked her authorization (R. 162-163). Thus, at its high point, counting the revoked card, the union had twenty-one designation cards.**

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* The alleged violations of section 8 (a) (1) are:

A female supervisor made comments to three female employees, friends of hers, about the wearing of union buttons. In addition, ten weeks before the date scheduled for the election, wages were increased and thirteen (that is one-third of the female employees in the unit) who had been working on a 40 hour-six-day week were put on a 40 hour-five-day week (so that the work-week would be uniform for all female employees) though only one of the thirteen had requested a five day week. There was evidence that both were done merely to meet the competition of petitioner's next-door neighbor, S. H. Kress Company but the Board held that such changes tended to discourage union membership. And finally, petitioner announced that it would never operate a store where union membership was a condition of employment. This, too, was held to violate section 8 (a) (1) though petitioner's announcement followed the union's statement that it would "never go" for an open shop.

** One of the employees who had signed an authorization card left petitioner's employ on January 14, 1950. Thus, when petitioner's labor counsel, on January 25, 1950, met the union's representatives the unit consisted of thirty-nine employees of whom twenty had signed authorization cards.

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Specification of Error

The Court of Appeals erred in regarding the first question as inconsequential "particularly"—to quote the court —"as it appears that the union representative called personally on the manager a few days later and again requested bargaining" (R. 216). (By this it is meant that the union's representative made a demand for bargaining after the union had obtained cards from twenty-one of the forty non-supervisory employees then on the payroll). There is no basis for finding that such a request was made; for there was no demand or request for bargaining other than the demand of January 5, 1950, which was coupled with the misrepresentation of majority status* and neither has the union at any time claimed nor has the Board found that there was any further demand.**

Actually, the business agent's visit to the store, to which the court referred, preceded the receipt of the written request dated January 5, 1950 for a bargaining conference (R. 169). And, of course, the court erred in construing, as

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* It is apparent that the union was of the belief, when it had eighteen authorization cards, that it had cards from a majority of the employees. For when it filed the petition for an election it stated (R. 125) that there were thirty-four employees in the unit.

** Petitioner, on June 21, 1951, moved for a reconsideration of the Board's finding that it had unlawfully refused to bargain (R. 60) and in its brief it characterized the union's invalid demand as no demand, citing *N. L. R. B.* v. *Valley Broadcasting Company*, 189 F. 2d 582. The union's attorney opposed the motion by means of a telegram (R. 213) to the Board worded as follows:

> "VALLEY BROADCASTING CASE NOT IN POINT BECAUSE NO REQUEST FOR BARGAINING MADE BY UNION. IN OUR CASE UNEQUIVOCAL DEMAND MADE ON JANUARY 5, 1950. SEE GENERAL COUNSEL EXHIBIT NUMBER 36. MOTION SHOULD BE DENIED FORTHWITH."

The motion was denied.

a demand for bargaining, the statement that the business agent made on January 5.* Strangely enough, the petitioner is charged with refusing to bargain, not early in January, but on January 25, 1950 and subsequent thereto. On January 25, however, aside from petitioner's statement, on the one hand, of its abhorrence of compulsory union membership and, the union's statement, on the other hand, that it would never permit petitioner to operate an open shop, the meeting was confined entirely to a discussion of ways and means of proving the union's majority status, the petitioner suggesting that it should be done by means of a secret election conducted by the Board and the union insisting "that we don't have an election, since it takes so much time and so much nonsensical procedure" (R. 206). As stated above, no demand for bargaining was made after January 5, 1950.

The court also erred in holding that the union's majority status, as evidenced by the authorization cards, continued through the work-week ending on January 25, 1950. For the record is clear that, during the month of January, one of the employees, Omera Guillory, revoked her authorization.** Unfortunately, your petitioner does not know the

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* The business agent testified (R. 114): "I paid a visit to Mr. Kihs in the San Jose, Grant store following the letter asking the company for recognition. The conversation was very simple; I merely stated to him that I represented the Retail Clerks Union, who had sent him this letter asking for recognition, that we feel that a majority of the people had designated us as their collective bargaining representative, and therefore we feel that we have a right to come into this store and speak to people, the employees of the company, about the Union, call a meeting and such."

** In the Board's brief, as submitted to the Court of Appeals, it is said:

"Even if, *arguendo* Guillory's action were considered a revocation of her authorization of the Union to bargain for her, there is no evidence as to when it occurred other than during the month of January, 1950, or thereafter (R. 162-163) * * *. Absent more

(*Footnote continued on following page*)

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date of her revocation. The union, however, was informed and, conceivably, might have been able to help resolve the question whether her revocation was before, on, or after January 25, 1950. For, following her revocation the union's business agent visited Mrs. Guillory, at her home (R. 163-164) asking her to reconsider or, as he, himself, put it "asking her to join the Union" (R. 130). Neither the union's counsel nor the Board's General Counsel offered any evidence that the revocation occurred after January 25, 1950.

Reasons for Granting the Writ

The court of appeals has decided important questions which have not, but should be, settled by this court, and which, unless they are, will in all probability arise time and again. Let it be said at the outset that your petitioner does not contend that the right of employees to bargain collectively, through an exclusive bargaining representative, should be conditioned upon an antecedent certification by the Board in any case where the majority status of the union is clearly apparent.

But here, petitioner submits, the union could not clearly establish majority status either on January 5, 1950, when it demanded bargaining rights or on January 25, 1950, when its officials conferred with petitioner's labor counsel. Obviously, it would have been improper for petitioner to

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(Footnote continued from preceding page)

specific evidence, the Board was certainly not required to assume that the revocation, if any, occurred before January 25, the date of respondent's wrongful refusal to bargain. If it occurred thereafter, the revocation could, of course, be attributable to respondent's unfair labor practice and hence would not operate to defeat the Union's majority." This argument is specious, particularly as, aside from the alleged refusal to bargain, your petitioner is not and was not charged with having engaged in any unfair labor practice until February 11, 1950, that being the date on which it posted a notice to employees stating that its open shop policy would not be changed.

recognize the union as spokesman for its employees, on either of such dates, particularly as the evidence of the extent of organization, as produced at the hearing held in November, 1950 showed that from the outset about 50% of the employees were opposed to union representation.*

Throughout this proceeding the Board has contended that the petitioner could not have had any genuine doubt as to whether or not the union had majority status but, on the other hand, there has been no suggestion that petitioner made any attempt, at any time to ascertain whether any employee did or did not sign a union card. Standing aloof, as an employer must and as petitioner did, an employer cannot possibly know, except where the union's organizational campaign is openly and visibly successful, whether

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* Anyone engaged in the practice of labor law well knows, and the Board's records will convincingly show, that at a free election, it very often happens that the union receives fewer votes than the number of authorization cards it was able to gather in its organizational campaign. For it is common knowledge that authorization cards are often signed under some sort of pressure exerted by union organizers, whether they be paid organizers or union-minded co-workers, and are not infrequently signed as a result of misrepresentation. Two such instances, both involving this petitioner, occurred in the experience of the writer of this petition. In one of these, involving petitioner's store in *Gadsden, Ala.* (Case No. 10-RC-1204) the union's petition showed that thirteen of a unit of twenty employees had signed authorization cards. But only ten of the employees voted for the union, the election resulting in a tie vote. In the other, involving petitioner's store at *Bellaire, Ohio* (Case No. 8-R-2669) the unit consisted of nineteen employees and whereas ten of these, according to the Union's petition, had signed authorization cards, only three of the nineteen voted for union representation. This was probably the result of petitioner's exposure of deception practiced by the union on the employees, in fraudulently exaggerating the wages and working conditions under the union's existing contracts in the community, the terms of which were actually far less liberal than the conditions which had prevailed, for many years, in petitioner's store. Nevertheless, had the union there taken the steps that the union here has taken the Board would have directed the employer, your petitioner, to bargain on the basis of the authorization cards.

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a majority of his employees signed cards. If the union's right to recognition, in a case such as this, depended on an employer's belief, it would tend to weaken the guarantees of the Act. At best, the employees' protected rights would be made to vary with the state of the employer's mind. On the other hand, if that were the test, it could lead to fraud and collusion between employers and unions.

But, as Judge Learned Hand has said, "the overriding consideration must always be the employees' untrammelled freedom of choice; upon that the whole framework rests" (*N. L. R. B.* v. *Dadourian Export Corporation*, 138 F. 2d 891, 893). In the instant case, however, attention has been focused on the interests of the complaining union and the accused employer. The interests of 50% of the employees who did not want to be represented by the union have been completely forgotten.

Conclusion

Since the union was never in a position clearly to establish its majority status and, in any case, never made a valid demand for bargaining the petition for a writ of certiorari should be granted. The questions involved are as novel as they are important and should be reviewed by this court.

Dated, New York, N. Y., December 12, 1952.

Respectfully submitted,

EUGENE M. FOLEY,
Attorney for W. T. Grant Company,
Petitioner.

Appendix

The pertinent provisions of section 8 (a) (1) and (5) are as follows:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

The pertinent provisions of section 9 (c) (1) are as follows:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a),* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

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